No. 80-1083

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1980

BARNEY'S CLUB, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SPARKS NUGGET, INC.,
d/b/a JOHN ASCUAGA'S NUGGET,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

PRIOR CASES BEFORE THIS COURT RELIED ON BY THE BOARD AND THE UNION INVOLVING NEITHER OF THE PETITIONERS NOR ISSUES PRESENTED HERE SHOULD NOT BE CONTROLLING

The Board and the Union assert that the instant cases "present the same issues"

and "the same arguments . . . already determined" in N.L.R.B. v. Tahoe Nugget, Inc., d/b/a/ Jim Kelley's Tahoe Nugget and Nevada Lodge, 584 F.2d 293 (9th Cir. 1978) cert. denied, 442 U.S. 921, and Sahara-Tahoe Corp. v. N.L.R.B., 581 F.2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). [Bd. Brief in Opp., pp. 7-8; Union Br. in Opp., p. 3.] These assertions ignore the declaration of the Ninth Circuit that in the instant cases:

> We recognize the force of [petitioners'] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (Fn.) [The footnote cites these cases from the other Circuits.] (Emphasis added. Pet. App. p. 15).

The Ninth Circuit opinion here is at odds with eight other circuits. Several of the cases Petitioners cited in the lower

court were decided after this Court considered the Tahoe Nugget, Nevada Lodge and Sahara-Tahoe decisions, as well as these cases involve separate issues. Further, the court below "accept[ed] arguendo that a conflict exists on the issue" (Pet. App. p. 15), which was not conceded in those earlier decisions. This "important and difficult question ... of current national interest" warrants the careful attention and consideration of this Court. Tahoe Nugget, Nevada Lodge and Sahara-Tahoe should not control as different, distinct issues are presented.[1/]

1/ Justice White would have granted certiorari in Tahoe Nugget and Nevada Lodge, 442 U.S. 921. Several cases cited by the lower court here were not decided at that time. See, e.g., W & W Steel v. N.L.R.B., 599 F.2d 934 (10th Cir. 1979); see also Sahara-Tahoe Corp. v. N.L.R.B., et al., ___ F.2d ___ (9th Cir. 1980), petition pending No. 80-1452 (February 25, 1981).

By rejecting the analysis and authority of the circuit courts of appeal, the Ninth Circuit has created and conceded a clear, real and disrupting conflict among the circuits.[2/] The ill-advised attempts by the Board and Union to ignore this conflict [Bd. Br. in Opp. p. 8, Union Br. in

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2/ The Court listed those conflicting decisions in footnote 9 (Pet. App. p. 15):

> Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, eg., Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542 (7th Cir. 1970); Star Manufacturing Co. v. N.L.R.B., 536 F.2d 1192 (7th Cir. 1976); Lodges 1746 & 743, Int'l Assn. of Mach. & Aero Workers v. N.L.R.B., 416 F.2d 809 D.C. Cir.), cert. denied, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); Teamsters Local U. 769 v. N.L.R.B., 532 F.2d 1385 (D.C. Cir. 1976); National Cash Register Co. v. N.L.R.B., 494 F.2d 189 (8th Cir. 1974); National Car Rental System v. N.L.R.B., 594 F.2d 1203 (8th Cir. 1979); N.L.R.B. v. Alvin J. Bart & Co., Inc. 598 F.2d 1267 (2d Cir. 1979); W & W Steel Co. v. N.L.R.B. 599 F.2d 934 (10th Cir. 1979); Automated Business Systems v. N.L.R.B.,

Union Br. in Opp. p. 3-4] also confirm its existence.

Even the dissent in W & W Steel, which the lower court, Board and Union failed to distinguish, recognized (at 599 F.2d 942, n. 4) the conflict created by the Ninth Circuit, "acknowledg[ing] that this presumption has not received universal acclaim", citing N.L.R.B. v. Tahoe Nugget, supra. Further, the presumption flys in the face of the "prevailing statutory policy" mandated by the Court in N.L.R.B. v. Iron Workers Local No. 103, 434 U.S. 335 (1978) that unions cannot have" "the power to completely frustrate employee realization of the premise of the Act--that its

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2/ Cont'd. from p. 4

497 F.2d 262 (6th Cir. 1974); N.L.R.B. v. Nu-sourthern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1971); N.L.R.B. v. Randall-Eastern Ambulance Service, Inc. 584 F.2d 720 (5th Cir. 1978).

prohibitions will go far to assure freedom of choice and majority rule in employee selections of representatives." [Cite omitted] 434 U.S. at 344.[3/] In sum, the conflict which the lower court concedes, and the Board and Union gloss over, is an important and recurring one which this Court should resolve to maintain uniformity among the circuits in a major area of national labor relations and federal labor policy.

II.

THE NEVADA GAMING CONTROL ACT WARRANTS PETITIONERS' BROAD NO-SOLICITATION RULES

The Board and Union assert that "bartenders, cocktail waitresses or other persons engaged in preparing or serving food or beverages" do not fit the definition

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3/ The Board and Union failed to oppose Petitioners' arguments regarding N.L.R.B. v. Iron Workers Local No. 103, supra (Pet. p. 7-8).

of "gaming employee" under Nevada law [Nev. Rev. Stat. § 463.335(1)(a) (1979)]. Thus, they contend Petitioners' arguments regarding no-solicitation rules are without merit. (Bd. Br. in Opp. p. 10-11, Union Br. in Opp. 11-12). These assertions ignore, or at least miss the point. Petitioners do not urge that the employees purportedly represented by the Union are "gaming employees" but rather submit that under the Nevada Gaming Control Act Petitioners are obligated to police their establishments "to prevent incidents" such as solicitations by off-shift employees who, as a part of the public, are subject to Petitioners' no-solicitation rules, as well as the Nevada Gaming laws. [Gaming Control Act, Chapter 463.151(3), Regulation 5.011(1)]. Those rules are established in the interest of the health, safety and morals of the State of Nevada, which interests this Court has

held that states can regulate when, as here, "an overriding state interest" (i.e. regulation of the gaming industry) exists. See, San Diego Trades Council v. Garmon, 359 U.S. 243 (1959); Teamsters, Local 24 v. Oliver, 358 U.S. 283 (1959).

Petitioners' rules, based on the State's regulations, only constrict the organizational rights of off-shift employees who the Board and the courts have indicated should be treated as nonemployee solicitors. GTE Lenkurt, Inc., 204 NLRB 921 (1973); Diamond Shamrock Co.v. N.L.R.B., 443 F.2d 52 (3rd Cir. 1971). This Court has recently upheld a state court application of state trespassing laws even though those laws had some limiting effect on the arguably protected organizational rights of nonemployees. Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978).

In short, the Board and/or the Court

below should have deferred to the Nevada Gaming statutes and regulations, and thereby determined that "special circumstances" exist which authorize Petitioners' promulgation and implementation of their no-solicitation rules. Republic Aviation Corporation v. N.L.R.B., 324 U.S. 793 (1945), N.L.R.B. v. Beth Israel Hospital, 437 U.S. 483 (1978).

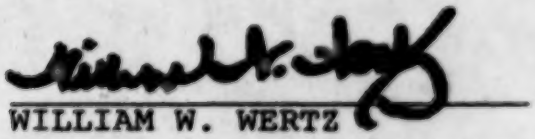
III.

CONCLUSION

The issues raised by Petitioners are constantly recurring ones affecting federal labor law and policy. Further, the conflict existing among the circuits presents a confused state of national labor relations law and policy administration on these issues, which should not be allowed to continue by the happenstance of the

circuit court involved, but rather should be settled by clear, final resolution by this Court.

Respectfully submitted,



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